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OrthoClear Holdings, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALIGN TECHNOLOGY, INC.,

Plaintiff,

v.

ORTHOCLAR, INC. and
ORTHOCLAR HOLDINGS, INC.,

Defendants.

Case No. CV 05-02948 MMC

STIPULATED PROTECTIVE ORDER

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords extends only to the limited information or items that are entitled under the applicable legal principles to treatment as confidential. The parties further acknowledge, as set forth in Section 10, below, that this Protective Order creates no entitlement to file confidential information under seal; Civil Local

1 Rule 79-5 sets forth the procedures that must be followed and reflects the standards that will be
2 applied when a party seeks permission from the court to file material under seal.

3
4 2. DEFINITIONS

5 2.1 Party: any party to this action, including all of its officers, directors,
6 employees, consultants, retained experts, and outside counsel (and their support staff).

7 2.2 Disclosure or Discovery Material: all items or information, regardless of
8 the medium or manner generated, stored, or maintained (including, among other things,
9 testimony, transcripts, or tangible things) that are produced or generated in disclosures or
10 responses to discovery in this matter.

11 2.3 "Confidential" Information or Items: information (regardless of how
12 generated, stored or maintained) or tangible things that qualify for protection under standards
13 developed under F.R.Civ.P. 26(c).

14 2.4 "Highly Confidential – Attorneys' Eyes Only" Information or Items:
15 extremely sensitive "Confidential Information or Items" whose disclosure to another Party or
16 nonparty would create a substantial risk of serious injury that could not be avoided by less
17 restrictive means.

18 2.5 Receiving Party: a Party that receives Disclosure or Discovery Material
19 from a Producing Party.

20 2.6 Producing Party: a Party or non-party that produces Disclosure or
21 Discovery Material in this action.

22 2.7 Designating Party: a Party or non-party that designates information or
23 items that it produces in disclosures or in response to discovery as "Confidential" or "Highly
24 Confidential — Attorneys' Eyes Only."

25 2.8 Protected Material: any Disclosure or Discovery Material that is
26 designated as "Confidential" or as "Highly Confidential – Attorneys' Eyes Only."

27 2.9 Outside Counsel: attorneys who are not employees of a Party but who are
28 retained to represent or advise a Party in this action.

1 2.10 House Counsel: attorneys who are employees of a Party.

2 2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well
3 as their support staffs).

4 2.12 Expert: a person with specialized knowledge or experience in a matter
5 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
6 witness or as a consultant in this action and who is not a past or a current employee of a Party or
7 of a competitor of a Party's and who, at the time of retention, is not anticipated to become an
8 employee of a Party or a competitor of a Party's. This definition includes a professional jury or
9 trial consultant retained in connection with this litigation.

10 2.13 Professional Vendors: persons or entities that provide litigation support
11 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
12 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
13 subcontractors.

14
15 3. SCOPE

16 The protections conferred by this Stipulation and Order cover not only Protected
17 Material (as defined above), but also any information copied or extracted therefrom, as well as all
18 copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or
19 presentations by parties or counsel to or in court or in other settings that might reveal Protected
20 Material.

21
22 4. DURATION

23 Even after the termination of this litigation, the confidentiality obligations imposed
24 by this Protective Order shall remain in effect until a Designating Party agrees otherwise in
25 writing or a court order otherwise directs.

1 5. DESIGNATING PROTECTED MATERIAL

2 5.1 Exercise of Restraint and Care in Designating Material for Protection.

3 Each Party or non-party that designates information or items for protection under
4 this Order must take care to limit any such designation to specific material that qualifies under the
5 appropriate standards. A Designating Party must take care to designate for protection only those
6 parts of material, documents, items, or oral or written communications that qualify – so that other
7 portions of the material, documents, items, or communications for which protection is not
8 warranted are not swept unjustifiably within the ambit of this Order.

9 Mass, indiscriminate, or routinized designations are prohibited. Designations that
10 are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to
11 unnecessarily encumber or retard the case development process, or to impose unnecessary
12 expenses and burdens on other parties), expose the Designating Party to sanctions.

13 If it comes to a Party's or a non-party's attention that information or items that it
14 designated for protection do not qualify for protection at all, or do not qualify for the level of
15 protection initially asserted, that Party or non-party must promptly notify all other parties that it is
16 withdrawing the mistaken designation.

17 5.2 Manner and Timing of Designations. Except as otherwise provided in this
18 Order (*see, e.g.*, second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered,
19 material that qualifies for protection under this Order must be clearly so designated before the
20 material is disclosed or produced.

21 Designation in conformity with this Order requires:

22 (a) for information in documentary form (apart from transcripts of
23 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
24 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" at the top
25 of each page that contains protected material. If only a portion or portions of the material on a
26 page qualifies for protection, the Producing Party also must clearly identify the protected
27 portion(s) (*e.g.*, by making appropriate markings in the margins) and must specify, for each
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1 portion, the level of protection being asserted (either “CONFIDENTIAL” or “HIGHLY
2 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

3 A Party or non-party that makes original documents or materials available for
4 inspection need not designate them for protection until after the inspecting Party has indicated
5 which material it would like copied and produced. During the inspection and before the
6 designation, all of the material made available for inspection shall be deemed “HIGHLY
7 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the
8 documents it wants copied and produced, the Producing Party must determine which documents,
9 or portions thereof, qualify for protection under this Protective Order, then, before producing the
10 specified documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL”
11 or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) at the top of each page that
12 contains Protected Material. If only a portion or portions of the material on a page qualifies for
13 protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making
14 appropriate markings in the margins) and must specify, for each portion, the level of protection
15 being asserted (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
16 EYES ONLY”).

17 (b) for testimony given in deposition or in other pretrial or trial
18 proceedings, that the Party or non-party offering or sponsoring the testimony may identify on the
19 record, before the close of the deposition, hearing, or other proceeding, all protected testimony,
20 and further specify any portions of the testimony that qualify as “HIGHLY CONFIDENTIAL –
21 ATTORNEYS’ EYES ONLY.” When it is impractical to identify separately each portion of
22 testimony that is entitled to protection, and when it appears that substantial portions of the
23 testimony may qualify for protection, the Party or non-party that sponsors, offers, or gives the
24 testimony may invoke on the record (before the deposition proceeding is concluded) a right to
25 have up to 20 days to identify the specific portions of the testimony as to which protection is
26 sought and to specify the level of protection being asserted (“CONFIDENTIAL” or “HIGHLY
27 CONFIDENTIAL - ATTORNEYS’ EYES ONLY”). Only those portions of the testimony that
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are appropriately designated for protection within the 20 days shall be covered by the provisions of this Stipulated Protective Order.

Transcript pages containing Protected Material must be separately bound by the court reporter, who must affix to the top of each such page the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," as instructed by the Party or nonparty offering or sponsoring the witness or presenting the testimony.

(c) for information produced in some form other than documentary, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." If only portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portions, specifying whether they qualify as "Confidential" or as "Highly Confidential – Attorneys' Eyes Only."

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. If material is appropriately designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" after the material was initially produced, the Receiving Party, on timely notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

1 6.2 Meet and Confer. A Party that elects to initiate a challenge to a
 2 Designating Party's confidentiality designation must do so in good faith and must begin the
 3 process by conferring directly (in voice to voice dialogue; other forms of communication are not
 4 sufficient) with counsel for the Designating Party. In conferring, the challenging Party must
 5 explain the basis for its belief that the confidentiality designation was not proper and must give
 6 the Designating Party an opportunity to review the designated material, to reconsider the
 7 circumstances, and, if no change in designation is offered, to explain the basis for the chosen
 8 designation. A challenging Party may proceed to the next stage of the challenge process only if it
 9 has engaged in this meet and confer process first.

10
 11 6.3 Judicial Intervention. A Party that elects to press a challenge to a
 12 confidentiality designation after considering the justification offered by the Designating Party
 13 may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule
 14 79-5, if applicable) that identifies the challenged material and sets forth in detail the basis for the
 15 challenge. Each such motion must be accompanied by a competent declaration that affirms that
 16 the movant has complied with the meet and confer requirements imposed in the preceding
 17 paragraph and that sets forth with specificity the justification for the confidentiality designation
 18 that was given by the Designating Party in the meet and confer dialogue.

19 The burden of persuasion in any such challenge proceeding shall be on the
 20 Designating Party. Until the court rules on the challenge, all parties shall continue to afford the
 21 material in question the level of protection to which it is entitled under the Producing Party's
 22 designation.

23 24 7. ACCESS TO AND USE OF PROTECTED MATERIAL

25 7.1 Basic Principles. A Receiving Party may use Protected Material that is
 26 disclosed or produced by another Party or by a non-party in connection with this case only for
 27 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
 28 disclosed only to the categories of persons and under the conditions described in this Order.

1 When the litigation has been terminated, a Receiving Party must comply with the provisions of
2 section 11, below (FINAL DISPOSITION).

3 Protected Material must be stored and maintained by a Receiving Party at a
4 location and in a secure manner that ensures that access is limited to the persons authorized under
5 this Order.

6 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
7 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
8 disclose any information or item designated CONFIDENTIAL only to:

9 (a) the Receiving Party's Outside Counsel of record in this action, as
10 well as employees of said Counsel to whom it is reasonably necessary to disclose the information
11 for this litigation and who have signed the "Agreement to Be Bound by Protective Order" that is
12 attached hereto as Exhibit A;

13 (b) the officers, directors, and employees (including House Counsel) of
14 the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have
15 signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

16 (c) experts (as defined in this Protective Order) of the Receiving Party
17 to whom disclosure is reasonably necessary for this litigation and who have signed the
18 "Agreement to Be Bound by Protective Order" (Exhibit A);

19 (d) the Court and its personnel;

20 (e) court reporters, their staffs, and professional vendors to whom
21 disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be
22 Bound by Protective Order" (Exhibit A);

23 (f) during their depositions, witnesses in the action to whom disclosure
24 is reasonably necessary and who have signed the "Agreement to Be Bound by Protective Order"
25 (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal
26 Protected Material must be separately bound by the court reporter and may not be disclosed to
27 anyone except as permitted under this Stipulated Protective Order; and
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(g) the author of the document or the original source of the information.

7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" only to:

(a) the Receiving Party's Outside Counsel of record in this action, as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Agreement to Be Bound by Protective Order" that is attached hereto as Exhibit A;

(b) Experts (as defined in this Protective Order) of the Receiving Party (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4, below, have been followed;

(c) the Court and its personnel;

(d) court reporters, their staffs, and professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order (Exhibit A); and

(e) the author of the document or the original source of the information.

7.4 Procedures for Approving Disclosure of Protected Material to "Experts."

(a) Unless otherwise ordered by the court or agreed in writing by the Designating Party, a Party that seeks to disclose to an "Expert" (as defined in this Order) any information or item that has been designated "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" first must make a written request to the Designating Party that (1) identifies the specific HIGHLY CONFIDENTIAL information that the Receiving Party seeks permission to disclose to the Expert; (2) sets forth the full name of the Expert and the city and state of his or her primary residence, (3) attaches a copy of the Expert's current resume, (4) identifies the

1 Expert's current employer(s), (5) identifies each person or entity from whom the Expert has
2 received compensation for work in his or her areas of expertise or to whom the expert has
3 provided professional services at any time during the preceding five years, and (6) identifies (by
4 name and number of the case, filing date, and location of court) any litigation in connection with
5 which the Expert has provided any professional services during the preceding five years.

6 (b) A Party that makes a request and provides the information specified
7 in the preceding paragraph may disclose the subject Protected Material to the identified Expert
8 unless, within seven court days of delivering the request, the Party receives a written objection
9 from the Designating Party. Any such objection must set forth in detail the grounds on which it is
10 based.

11 (c) A Party that receives a timely written objection must meet and
12 confer with the Designating Party (through direct voice to voice dialogue) to try to resolve the
13 matter by agreement. If no agreement is reached, the Party seeking to make the disclosure to the
14 Expert may file a motion as provided in Civil Local Rule 7 (and in compliance with Civil Local
15 Rule 79-5, if applicable) seeking permission from the court to do so. Any such motion must
16 describe the circumstances with specificity, set forth in detail the reasons for which the disclosure
17 to the Expert is reasonably necessary, assess the risk of harm that the disclosure would entail and
18 suggest any additional means that might be used to reduce that risk. In addition, any such motion
19 must be accompanied by a competent declaration in which the movant describes the parties'
20 efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and confer
21 discussions) and sets forth the reasons advanced by the Designating Party for its refusal to
22 approve the disclosure.

23 In any such proceeding the Party opposing disclosure to the Expert shall
24 bear the burden of proving that the risk of harm that the disclosure would entail (under the
25 safeguards proposed) outweighs the Receiving Party's need to disclose the Protected Material to
26 its Expert.

1 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
 2 OTHER LITIGATION.

3 If a Receiving Party is served with a subpoena or an order issued in other litigation
 4 that would compel disclosure of any information or items designated in this action as
 5 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL - ATTORNEYS’ EYES ONLY,” the
 6 Receiving Party must so notify the Designating Party, in writing (by fax, if possible) immediately
 7 and in no event more than three court days after receiving the subpoena or order. Such
 8 notification must include a copy of the subpoena, request for production, or court order.

9 The Receiving Party also must immediately inform in writing the Party who
 10 caused the subpoena, request for production, or order to issue in the other litigation that some or
 11 all the material covered by the subpoena, request for production, or order is the subject of this
 12 Protective Order. In addition, the Receiving Party must deliver a copy of this Stipulated
 13 Protective Order promptly to the Party in the other action that caused the subpoena or order to
 14 issue .

15 The purpose of imposing these duties is to alert the interested parties to the
 16 existence of this Protective Order and to afford the Designating Party in this case an opportunity
 17 to try to protect its confidentiality interests in the court from which the subpoena or order issued.
 18 The Designating Party shall bear the burdens and the expenses of seeking protection in that court
 19 of its confidential material – and nothing in these provisions should be construed as authorizing or
 20 encouraging a Receiving Party in this action to disobey a lawful directive from another court.

21
 22 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

23 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
 24 Protected Material to any person or in any circumstance not authorized under this Stipulated
 25 Protective Order, the Receiving Party must immediately (a) notify in writing the Designating
 26 Party of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected
 27 Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the
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1 terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and
2 Agreement to Be Bound" that is attached hereto as Exhibit A.

3
4 10. FILING PROTECTED MATERIAL.

5 (a) Without written permission from the Designating Party or a court
6 order secured after appropriate notice to all interested persons, a Party may not file in the public
7 record in this action any Protected Material. A Party that seeks to file under seal any Protected
8 Material must comply with Civil Local Rule 79-5.

9
10 11. FINAL DISPOSITION.

11 Unless otherwise ordered or agreed in writing by the Producing Party, within sixty
12 days after the final termination of this action, each Receiving Party must return all Protected
13 Material to the Producing Party. As used in this subdivision, "all Protected Material" includes all
14 copies, abstracts, compilations, summaries or any other form of reproducing or capturing any of
15 the Protected Material. With permission in writing from the Designating Party, the Receiving
16 Party may destroy some or all of the Protected Material instead of returning it. Whether the
17 Protected Material is returned or destroyed, the Receiving Party must submit a written
18 certification to the Producing Party (and, if not the same person or entity, to the Designating
19 Party) by the sixty day deadline that identifies (by category, where appropriate) all the Protected
20 Material that was returned or destroyed and that affirms that the Receiving Party has not retained
21 any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of
22 the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival
23 copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney
24 work product, even if such materials contain Protected Material. Any such archival copies that
25 contain or constitute Protected Material remain subject to this Protective Order as set forth in
26 Section 4 (DURATION), above.

1 12. INADVERTENT DISCLOSURE

2 Inadvertent disclosure of any document or other information covered by the
3 attorney-client privilege, work-product of other applicable privileges during discovery in this
4 matter, or inadvertent disclosure of confidential information without appropriate designation,
5 shall be without prejudice to any claim that such document or other information is privileged or
6 confidential, and no party shall be held to have waived any rights by such inadvertent disclosure.
7 If the Producing Party claims that document or other information was inadvertently disclosed the
8 Receiving Party shall not use for any purpose and shall immediately return any inadvertently
9 produced privilege material. The inadvertent, unintentional, or in camera disclosure of
10 Confidential Information shall not, under any circumstances be deemed a waiver, in whole or in
11 part, of any claims of privilege or confidentiality.

12 13. PATENT PROSECUTION LIMITATION

13 No person who has obtained access to a Designating Party's "Highly Confidential
14 — ATTORNEYS EYES ONLY" information or items shall, during the litigation and for a period
15 up to two (2) years after the litigation's termination, participate in the prosecution of the
16 Receiving Party's patent applications relating in any way to teeth, imaging of teeth, tooth
17 position, movement of teeth, dentistry, or orthodontics, including, but not limited to, computer
18 technology relating in any way to teeth, imaging of teeth, tooth positions, movement of teeth,
19 dentistry, or orthodontics, unless otherwise ordered by the Court or permitted in writing by the
20 Designating Party.

21 Notwithstanding the above, witnesses who have only obtained "HIGHLY
22 CONFIDENTIAL — ATTORNEYS EYES ONLY" information under Section 7.3(e) of this
23 Protective Order are not subject to this Patent Prosecution Limitation.

24 14. MISCELLANEOUS

25 14.1 Right to Further Relief. Nothing in this Order abridges the right of any
26 person to seek its modification by the Court in the future.

27 14.2 Right to Assert Other Objections. By stipulating to the entry of this
28 Protective Order no Party waives any right it otherwise would have to object to disclosing or

1 producing any information or item on any ground not addressed in this Stipulated Protective
2 Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of
3 the material covered by this Protective Order.
4

5 IT IS SO STIPULATED THROUGH COUNSEL OF RECORD.

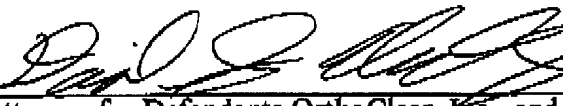
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7 **PAUL, HASTINGS, JANOFSKY & WALKER LLP**

8 DATED: 2/23/06

9 By: 
Attorney for Plaintiff Align Technology, Inc.

10 **O'MELVENY & MYERS LLP**

11 DATED: 2/21/06

12 By: 
13 Attorney for Defendants OrthoClear, Inc., and
14 OrthoClear Holdings, Inc.

15 PURSUANT TO STIPULATION, IT IS SO ORDERED.

16
17 DATED: February 27, 2006

18 By: 
19 Hon. Maxine M. Chesney
20 United States District Court Judge